86-489

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

W. T. LANGLEY AND MARY ANN GRIMES LANGLEY,
PETITIONERS

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the statutory language of 12 U. S. C. 1823(e) barring oral agreements between an obligor and a failed bank from being asserted as a defense against a suit on a promissory note by the Federal Deposit Insurance Corporation encompasses situations where the makers of the note assert fraud in the inducement of the underlying obligation.

PARTIES TO THE PROCEEDINGS

Federal Deposit Insurance Corporation (as successor to Planters Trust and Savings Bank)

W. T. Langley

Mary Ann Grimes Langley

Roy E. Caughfield

Federal Land Bank of Jackson

Elmer Landry

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The Petitioners, W. T. Langley and Mary Ann Grimes Langley (the "Langleys"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 25, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 792 F. 2d 541 (5th Cir. 1986). A copy of the opinion is attached hereto as Appendix A. The opinion of the United States District Court for the Western District of Louisiana granting respondent's motion for summary judgment is reported at 615 F. Supp. 749 (W. D. La. 1985) and a copy is attached hereto as Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 25, 1986. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254(1).

STATUTES INVOLVED

This case involves the interpretation of Section 2[13](3) of the Federal Deposit Insurance Act of 1950, as amended, codified as 12 U. S. C. 1823(e) as follows:

> "No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a

> loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank."

STATEMENT OF THE CASE

On October 3, 1980, a purchase agreement was entered into by W. T. Langley, a resident of Blytheville, Arkansas, and Leenerts Farms, Inc. ("Leenerts") for a farm containing "a total of 1,600 acres, more or less" in Pointe Coupee Parish, Louisiana, (hereinafter the "Melville Property"). The actual acquisition of the Melville property occurred on December 19, 1980. Financing for the purchase was provided to the Langleys by the Federal Land Bank in the amount of $1,350,000.00, secured by a first mortgage on the property and by Planters

Trust & Savings Bank ("Planters") in the amount of $450,000.00, secured by a second mortgage in the amount of $500,000.00 on the property. The balance owed on the Planters note, including interest, was renewed on January 27, 1982 and again on March 8, 1982. This latter note was sued upon by Planters in Louisiana state court in September, 1983. The Langleys removed this action to the United States District Court for the Western District of Louisiana on the basis of diversity jurisdiction. On October 18, 1983, the Langleys filed a complaint in the United States District Court for the Middle District of Louisiana, alleging a right to affirmative recovery from Planters and the other defendants therein in excess of $5,000,000.00. Subsequently, both actions were consolidated in the Western District of Louisiana. On October 5, 1984, four months after Planters was declared to be in an unsafe and unsound condition, the FDIC, was substituted as a party plaintiff in these

consolidated proceedings. On June 10, 1985, the FDIC in its capacity as receiver of Planters was substituted as a party defendant in the action filed by the Langleys. As the holder of the Langleys' note to Planters, the FDIC then moved for summary judgment. As a defense against the claims on the promissory notes by Planters and the Federal Land Bank ("FLB"), the Langleys allege in their action for affirmative recovery that Elmer Landry (formerly President of the Federal Land Bank Association of Opelousas) and Roy Caughfield (formerly President of Planters), both of whom are defendants in the District Court, fraudulently induced the Langleys to sign the Planters note and all preceding notes by certain statements, claims, representations, inducements, and omissions knowingly made by Caughfield and Landry, individually and on behalf of Planters and the FLB, respectively, regarding that which would be conveyed to the Langleys, the in rem nature

of the loan, the interst rate to be charged and the terms of the loan, as well as other misrepresentations more particularly within the knowledge of Caughfield and Landry. The Langleys allege that but for these misrepresentations, inducements, and omissions by Caughfield and Landry, individually and on behalf of Planters and the FLB, respectively, they would not have purchased the Melville property and signed the promissory notes herein sought to be enforced. Thus, the Langleys seek a declaration that the promissory notes and mortgages of Planters and the FLB are unenforceable, null and void for failure or want of cause and, alternatively, for error occurring as a result of the fraudulent misrepresentations, inducements, and omissions of the defendants or, in the further alternative, limiting enforcement of the notes and mortgages to the property itself.

Specifically, the Langleys allege that:

1.) Rather than the 1,628.4 acres represented orally, in the sale itself, and on a map prepared by or on behalf of the FLB, the Melville property consists of only 1,522 acres;

2.) Rather than receiving 400 mineral acres as was orally represented to the Langleys, only approximately 75 mineral acres was transferred;

3.) Caughfield, individually and on behalf of Planters, represented that no outstanding mineral leases burdened the property when in truth and fact, there existed an outstanding mineral lease held by Chevron, U.S.A. and, furthermore, the executive rights were held by another third party, John Barton; and

4.) The defendants engaged in a pattern of racketeering activity

> reprobated by 18 U.S.C. 1961, et seq., in that they have repeatedly used the United States mails and other interstate communications to further their fraudulent scheme which was designed to induce the Langleys to purchase the Melville property in order to rescue Planters from loans made to the prior owners of the Melville property which were in default (and who went bankrupt 3 months after the purchase), and to generate certain "fees" and "commissions" for Landry and Caughfield.

In answers to interrogatories, the Langleys have further asserted that Caughfield, individually and on behalf of Planters, made verbal representations in the presence of witnesses, on five or six occasions, that Leenerts owned 1,628.4 surface acres and 400

mineral acres that would be conveyed to the Langleys. The purchase agreement and the sale stated that 1,628.4 total acres were to be conveyed along with one-half of the mineral rights owned by Leenerts. Besides the overstated surface and mineral acreage, Landry and Caughfield made oral representations in front of witnesses that:

1.) The purchase price would be 100% financed;

2.) There would be no personal liability for the loans;

3.) There would be no payments due on the loan until the resale of the property was consummated;

4.) Langley would be provided a purchaser for the property as soon as the closing was consummated; and

5.) Langley would realize a large profit on the resale of the property.

On May 18, 1984, *seven months after the Langleys instituted their suit against Planters*, the Commissioner of Financial Institutions for the State of Louisiana declared Planters to be in an unsafe and unsound condition, closed Planters, and took possession of its books, property, and affairs. The Commissioner appointed the Federal Deposit Insurance Corporation (in its receivership capacity, the "FDIC") as receiver and liquidator thereof and the FDIC accepted such appointment. Pursuant to LSA - R. S. 6:457, upon the acceptance by the FDIC of its appointment as receiver and liquidator, the possession of and title to all of the assets, business, and property of the banking institution, of every kind and nature, passed to and vested in the FDIC as receiver without the execution of any instruments of conveyance, assignment, transfer or endorsement. Subsequently on May 18, 1984, pursuant to an order of the Twenty-Seventh Judicial District Court for

the Parish of St. Landry, State of Louisiana, the FDIC in its corporate capacity acquired all of the assets of Planters, including the assets which are the subject of this suit. This is known as a "purchase and assumption" transaction.

The District Court granted the FDIC's motion for summary judgment on the basis that 12 U.S.C. 1823(e) shields the FDIC from the affirmative defenses of the Langleys on the Planters note. The District Court noted, however, that there is authority for the Langleys' proposition that §1823(e) does not encompass situations where the maker of a note asserts fraud in the inducement of the underlying obligation. (Memorandum Ruling, p. A-23, *infra.*) The District Court also noted that there was no clear controlling precedent from the Fifth Circuit on this issue. Given the importance of a clear precedent on this issue and the possibility that district courts in the Fifth Circuit will be faced with similar

issues arising out of the collapse of Planters and other banks, the Langleys appealed.

The Fifth Circuit affirmed the District Court's judgment on the basis of §1823(e).

REASONS FOR GRANTING THE WRIT

The opinion of the Fifth Circuit in this case creates a conflict between the Circuit Courts over the interpretation of 12 U.S.C. 1823(e). See *Gunter v. Hutcheson*, 674 F. 2d 862 (11th Cir. 1982), *cert. denied*, 459 U.S. 826, 103 S. Ct. 60, 74 L.Ed.2d 63 (1982) and *FDIC v. Hatmaker*, 756 F. 2d 34 (6th Cir. 1985).

Section 1823(e) by its terms protects the FDIC only from "agreement[s]" not satisfying the section's requirement. In *Gunter* and *Hatmaker*, the Eleventh and Sixth Circuits have adopted an interpretation of §1823(e) which distinguishes between two types of fraud in the inducement in determining whether that section is applicable. One type is an oral promise by

the bank to perform a duty in connection with the execution of a note that it does not intend to perform. An example of such fraud in the inducement is a promise by the bank that the makers will not have to make any payments on the loan until the property securing the loan is sold by the makers. Another type of fraud in the inducement is a knowing misrepresentation made by the bank, not involving any promise, to induce a party to execute a promissory note. An example of such fraud in the inducement is a misrepresentation made by a bank that a given company is in sound financial condition in order to induce a party to borrow money to purchase stock in the company.

In the latter type of fraud in the inducement, there is no "agreement" between the parties; rather, a material misrepresentation regarding the subject matter of the loan fraudulently induces the borrowers consent to the transaction. The

Langleys claim that the representations made to them regarding the nature of the property purchased are so material to their consent that the proven falsity of these representations by an officer of the failed bank will negate the entire transaction. Thus, rather than attempting to hold a side agreement with the failed Planters Bank valid, the Langleys seek to prove that there was never an agreement at all because their consent was unlawfully obtained. As a result, Section 1823(e) is not applicable to this case. Section 1823(e) applies only to an "agreement" between a bank customer and the failed bank.

In *Gunter, supra*, the makers of a promissory note in favor of a failed bank brought suit against the failed bank and some of its officers and the FDIC. The FDIC had entered into a purchase and assumption agreement by which the FDIC purchased the note from another bank to which all of the failed bank's assets had been transferred.

The makers of the note sought rescission of the note against the FDIC asserting the violation of various securities laws and fraud as a result of actions taken by officers of the failed bank. Specifically, the makers alleged that in connection with the purchase of bank stock, the chairman of the board fraudulently represented that the bank was in "sound financial condition." The FDIC moved for summary judgment on the basis that it was protected against the customer's fraud claims by §1823(e) or under federal common law. The Eleventh Circuit Court of Appeals held that the claims by the makers of the note held by the FDIC were not barred by the statutory language in §1823(e). 674 F. 2d at 867.

The *Gunter* Court analyzed several decisions of the Fifth Circuit such as *Black v. FDIC*, 640 F. 2d 699 (5th Cir. 1981), *cert. denied*, 454 U. S. 838, 102 S. Ct. 143, 70 L.Ed.2d 119 (1981); *FDIC v. Hoover-Morris Enterprises*, 642 F. 2d 785 (5th Cir. 1981);

Chatham Ventures, Inc. v. FDIC, 651F. 2d 355 (5th Cir. 1981), *cert. denied*, 454 U. S. 1126, 102 S. Ct. 975 (1981); and *FDIC v. Lattimore Land Corp.*, 656 F. 2d 139 (5th Cir. 1981) which all held that Section 1823(e) shielded the FDIC from the defenses raised by the borrowers in those cases. With regard to these cases, the *Gunter* court reasoned:

> "The common thread running through these cases had been the assertion by the obligor that an oral side agreement with the bank controlled the rights of the parties. The cases, therefore, came squarely within the 'no agreement . . .shall be valid' language of Section 1823(e)." 674 F. 2d at 867.

The *Gunter* court went on to point out the difference between those cases and the case at bar:

> "The claim asserted by the Gunters, in contrast, is quite different. The essence of their argument is that no agreement existed because of the fraud of (the failed bank's) officers. While certain of the alleged misrepresentations could be construed as 'agreements' to perform certain acts in the future, such as deferring

> interest on the Gunters' notes, others clearly are not agreements of any sort. . . . Far from claiming that an oral agreement is 'valid' and controls the rights of the parties, the Gunters assert that the entire transaction was invalid from the beginning. As the district court noted, this claim is directly opposite to the 'shall be valid' language of Section 1823(e). Conse-quently, we agree with the trial court that the fraud claims at issue here are not barred by the statutory language in Section 1823." 674 F. 2d at 867.

The *Gunter* rationale has been approved by the Sixth Circuit Court of Appeals in the recent case of *FDIC v. Hatmaker*, 756 F. 2d 34 (6th Cir. 1985) where the Court stated:

> "Under section 1823(e), the case law has distinguished between two types of fraud in the inducement in determining whether that section is applicable. Gunter v. Hutcheson, 674 F. 2d 862, 867 (11th Cir. 1982), cert. denied, 459 U.S. 826, 103 S. Ct. 60, 74 L. Ed. 2d 63 (1982). One type of fraud in the inducement is an oral promise by the bank to perform a duty in connection

with the execution of a note that the bank does not intend to perform. An example of such fraud in the inducement is a promise by the bank to make future loans to the borrower which the bank does not plan to perform. See FDIC v. Lattimore Land Corp., 656 F. 2d 139 (5th Cir. 1981). Another type of fraud in the inducement is a misrepresentation made by the bank, not involving any promise, to induce a party to execute a promissory note. A good example of such fraud in the inducement is a misrepresentation by the bank that it is in sound financial condition in order to induce a party to borrow money to purchase its stock. Gunter, 674 F. 2d at 867.

In the second type of fraud in the inducement, no side agreement exists between the parties, and section 1823(e) cannot be applicable. In the first case, however, a side agreement is present to which section 1823 can be applied. Although that side agreement may have been fraudulently induced, it is still a separate agreement into which the parties voluntarily entered." 756 F. 2d at 36-37.

Further support for this position is found in the case of *In Re Longhorn Securities Litigation*, 573 F. Supp. 278 (W. D. Okla. 1983), where the court noted that both linguistically and legally, a representation is not an agreement. Black's Law Dictionary defines a representation as "a[s]tatement of fact made to induce another to enter into a contract," Black's Law Dictionary (5th Ed. 1979), p. 1169, whereas an agreement is defined as "a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances." Id. at 62. Webster's defines a representation as "a statement or account, especially made to convey a particular view or impression of something with the intention of influencing opinion or action." Webster's Third New International Dictionary (1981), p. 1926, whereas an agreement is defined as "the act of agreeing or coming to a mutual arrange-

ment." Id. at 43. A reading of the *Longhorn* case reveals the striking similarity between the allegations of the borrower in that case and the allegations advanced by the Langleys. 573 F. Supp. at 281.

In the instant case, the Langleys do in fact assert that there were "side agreements" concerning repayment of the note. The Langleys concede that the shield of §1823(e) protects the FDIC against their claims that the transaction should be rescinded as a result of representations made by Roy Caughfield, President of Planters, that the Langleys would have no personal liability on the notes, that the Langleys would not be required to make any payments on the subject loan until the property was sold and that the interest rate on the loan would be two (2%) percent above the prime rate of Chase Manhattan Bank. However, other misrepresentations alleged by the Langleys are clearly not agreements of any sort. For example, the Langleys allege

in Paragraph 23 of their original Complaint that the defendants represented that no outstanding mineral leases burdened the property when in truth and in fact there existed an outstanding mineral lease and, furthermore, the executive rights were held by another third party, John Barton. Also, according to the answers to Interrogatories, Landry and Caughfield claimed that the land included within its boundaries a certain number of surface acres and that the Langleys would obtain a certain percentage of mineral rights in the land. It is also alleged in the original Complaint that representations were made or facts were omitted by the defendants with the intention of convincing the Langleys to purchase property without being possessed of all the facts which defendants knew would be necessary for the Langleys to consider in order to make an informed decision regarding the purchase of the property and the terms thereof. The Langleys have alleged in

pleadings and have sworn in their answers to interrogatories that these representations were made. These allegations are clearly the same as those upheld by the Eleventh Circuit in *Gunter v. Hutcheson*, supra, as being claims that are not barred by the statutory language of §1823(e). The Langleys are not attempting to hold any side agreement with the failed Planters Bank valid; rather, the Langleys claims made in the original and amended Complaints, if proven, negate the entire transaction.

The Langleys' theory of fraudulent inducement as a result of the aforesaid misrepresentations is not a doctrine based on the parties' mutual assent. The Langleys contend that the Planters note is invalid and that such invalidity is caused by representations independent of any side agreement regarding the terms of the Planters loan. These false representations amount to factual fraud and are not barred by §1823(e) from being asserted against the

FDIC. *Gunter v. Hutcheson*, supra; *FDIC v. Hatmaker*, supra; *FDIC v. Leach*, 772 F. 2d 1262, 1267 (6th Cir. 1985).

CONCLUSION

The opinion of the Fifth Circuit in this case interpreting Section 1823(e) conflicts with *Gunter* and *Hatmaker*, decisions out of the Eleventh and Sixth Circuits respectively. In view of the rising number of bank failures in this country and increasing involvement of the FDIC, it is obvious that courts will be called upon to interpret Section 1823(e) in the future. Petitioners respectfully submit that certiorari should be granted in this case to resolve the conflict in the Circuit courts regarding the scope of Section 1823(e).

Respectfully submitted

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By:

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PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

William C. Shockey, after being duly sworn, deposes and says that pursuant to Rule 28 of this Court, he has served the Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit on counsel for the respondent by enclosing a copy thereof in an envelope, first class postage prepaid, properly addressed to:

1. Robert Pass
   Mark A. Brown
   Carlton, Fields, Ward, Emmanuel,
   Smith & Cutler, P.A.

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2. David S. Rubin
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and depositing same in the United States mail at Baton Rouge, Louisiana, on the _____ day of September, 1986.

_____
WILLIAM C. SHOCKEY

Sworn to and subscribed before me, this _____ day of September, 1986, at Baton Rouge, Louisiana.

_____
NOTARY PUBLIC
My Commission is for Life.